

1 he certainly had the opportunity for months frankly because the
2 RFP certainly clearly provided for the sale of the equipment to
3 ask that question. So we still submit that there is no
4 jurisdiction with this board in the protest hearing to consider
5 that issue.

6 MR. NEY: That may be so except that this board
7 is the board that has to determine the timeliness. What I need
8 to know is whether we are in the board for the determination
9 for you to just decide it is untimely, then we will have been
10 before the board. That actually, in my view, would require
11 that you treat it as a received protest and you just disposed
12 of it by saying it is untimely and don't go any deeper into the
13 merits; if that is what the board chooses to do.

14 To be candid, so Ms. Cottrell and Mr. Lodge knows what we
15 are doing, we are trying to find out what we need to do to
16 exhaust our remedies. We want to make sure that we have been
17 before the proper bodies. So I need to try to leave here
18 knowing that you have looked at it as part of the protest, but
19 that you resolved it one way or the other.

20 One way that you might resolve it is by saying it is
21 untimely. The jurisdictional issue has to be decided by this
22 review committee. It is the only group of people that can
23 decide the timeline issue.

24 MR. LEE: This commission in the past has taken
25 arguments that was filed after the ten day window and we have

1 listened to those. We have heard the arguments and taken the
2 issues very seriously. So what I think what Mr. Hawkins has
3 stated was that we are willing to listen to the arguments and
4 look at. That is not to say that we are not going to find it
5 timely or we are not going to find it not timely.

6 You have an interesting argument that you first noticed was
7 April 2nd, but then the other side of that is that you should
8 have known back, you know, and protested it by April 30th. So
9 we are willing to listen to those arguments too, I think, or at
10 least I am. So we would like to go ahead and get started if we
11 could.

12 MR. NEY: That is fine. I just needed to know
13 that it is in the protest proceeding, as part of the protest
14 proceeding record. I think you understand, Mr. Lee, what I'm
15 trying to get at.

16 COMMISSIONER WALTERS: I do understand, I need
17 to ask. I understand you would like to have it on the record
18 and I have no problem having it on the record. What I'm asking
19 is, does having it on the record mean that we have accepted it
20 in the same light as the other items listed in the formal
21 protest?

22 MR. NEY: That is what I need to know, yes.

23 MR. LEE: Well, in the past, I have been on this
24 body since day one; I am the only one, because of the change in
25 the administration. Ms. Rosson can correct me if I'm wrong but

1 in the past we have had some issues come up. We have listened
2 to those and then made a motion at the end. Just because
3 something is on the record does not mean -- the argument is on
4 the record but it does not mean that it is timely or untimely
5 or anything; it is just in the record.

6 If the arguments have been made at the appropriate time, we
7 can make motions. We can make the motion now, but I would like
8 to hear the argument.

9 MR. NEY: Commissioner Walters, the timeliness
10 issue, if it is determined, it is my view that you have looked
11 at it and treated it as though it were a protest. That is what
12 I'm wanting to make clear and that is fine whatever that result
13 is.

14 We will even, at this point, except because I think the
15 record needs to reflect this clearly that we have presented
16 this to you, and your department, and that you have denied that
17- element of the protest. It is just so we would properly put it
18 before this committee and know that full process has been gone
19 through. That it is now before here and it is conclusive that
20 this committee's determination is conclusive.

21 What we don't want to have is all of those things floating
22 around that may slow things down a day or two or anytime; we
23 don't want to slow anything down. We would except under those
24 circumstances that you just say, I understand it; I accept it;
25 I deny it. I think it is untimely and then put it here for the

1 committee to determine whether it is untimely or has any other
2 merit. That is what we are trying to do. We don't want to
3 slow things down by handing another letter to you and
4 delivering it to 12 other people and going through this whole
5 rigmarole. It has been processed, but I'm afraid that somebody
6 may perceive that as playing around and we are not doing that.
7 We just want to resolve it this morning if we can.

8 MS. COTTRELL: Again, really we are not trying
9 to be difficult; we are trying to figure out what exactly the
10 effect is of the process you are suggesting. I would have to
11 object to Mr. Ney's suggestion that the commissioner deem this
12 as having been presented today because it wasn't. It has never
13 been presented to her as a protest item.

14 I don't think it would be appropriate for her now to deem
15 it as having come in to her and rule upon it. It was brought
16 in the context of lifting the stay. Mr. Ney said on Friday
17 this is not a protest item and we agreed it was not a protest
18 item because of the ten day, knew or should have known.

19 Perhaps, and we strongly, strongly stand by that, that the
20 State has to have some and the other parties have to have some
21 definite end to when people can bring up additional issues. We
22 also understand that this is a serious consideration for any
23 State official who might be called upon to perform any duties
24 related to this or to sign the contract; we understand that.
25 If we were going to sign the contract, we would have similar

1 issues, too.

2 We would suggest that that is probably the issues for the
3 appropriate State officials to work out with their attorneys
4 and decide, you know, whatever is appropriate actions. If,
5 however, this committee wants to hear Mr. Ney's arguments about
6 this, which seems to be your preference, maybe we can do it
7 kind of like a proffer or something.

8 MR. NEY: May I address counsel directly because
9 we usually don't do that?

10 COMMISSIONER HAWKINS: That is fine; it is
11 Monday morning.

12 MR. NEY: The problem with that, Patsy, is if it
13 is not heard by the review committee now and Commissioner
14 Walters doesn't say, I deny that on that particular ground,
15 then we are going to have to hand deliver a letter to
16 Commissioner Walters when we leave which is going to request
17 the stay of the proceedings and another petition for protest.

18 This process will have to be reconvened even at least to
19 determine that you are going to lift the stay and that you
20 don't think there is any merit and it is untimely. I just
21 don't see the point in doing that and having you spend your
22 time doing that when we can address it here and we can resolve
23 it one way or the other.

24 That is what will happen when we leave here and I will hand
25 deliver the letter and we will crank up this process. The stay

1 is automatic. The review committee has to then convene to get
2 a written determination as to why it should be lifted; it seems
3 like a grand waste of time.

4 COMMISSIONER HAWKINS: Sadie, would you or can
5 you clarify for the committee, again, as far as the property
6 sale issue is concerned, what the purview of the Commissioner
7 of General Services, who we feel makes that determination,
8 where does that start, at what point with the review committee?

9 My take is that we are really usurping into their arena.
10 Whether it is a timely issue or not, it is something as far as
11 the process is concerned. It is something that is determined
12 by the Commissioner of General Services in conjunction with the
13 commissioner of the respective department involved. Can you or
14 would you elaborate for us so we can start moving ahead?

15 MS. SADIE ROSSON: The Commissioner of General
16 Services, it is my understanding pursuant to statute, is the
17 State official that determines how and by what method that the
18 sale lawfully occurs. It is my understanding that the
19 Commissioner of General Services at this point has not made a
20 determination regarding, No. 1, whether this particular RFP met
21 the standard for whether a sale could occur or has any other
22 way decided yet upon any request Commissioner Walters may make
23 in the future regarding the sale of this property.

24 So it is my understanding that the Commissioner of General
25 Services has not yet been a determination made by the

1 appropriate State official to even be reviewed by this review
2 committee or any other body at this point.

3 Now it is my understanding that any kind of decision made
4 by the Commissioner of General Services on this issue, is
5 probably an issue for the Board of Standards rather than this
6 review committee. The timely issue is one issue. The fact
7 that the issue wasn't raised to the commissioner at all is
8 another issue.

9 There obviously are a lot of sub-issues, but when it comes
10 right down to it, Mr. Hawkins, you are right that is a
11 determination for the Commissioner of General Services, which
12 don't think has been made yet so it is difficult to review it
13 even if this committee has the authority to review it. However
14 the finding of your jurisdiction is within your discretion.

15 COMMISSIONER HAWKINS: Say that again?

16 MS. SADIE ROSSON: Your jurisdiction and
17 parameter, you-all decide that.

18 COMMISSIONER WALTERS: There is one thing that
19 still don't understand because -- I understand the fact that I
20 know what position I hold and I also understand my position on
21 this panel and I can separate the two. The thing that I cannot
22 separate from either is the fact that I badly don't want to
23 screw this up, okay? The other issue for me is that this is
24 not varsity sports; it is intramural in the fact that I know
25 both parties, okay?

1 Is what you are saying to me and I need for you to speak
2 English not lawyer, okay?

3 MR. NEY: Uh-huh.

4 COMMISSIONER WALTERS: Is what you are saying to
5 me is if we do not listen to this, if we do not consider this
6 as part of the formal protest, you are going to the courthouse?

7 MR. NEY: No, the next step will be to serve you
8 with a letter requesting a protest on the grounds that there
9 was improper disposition of State property. That would then
10 trigger the same proceeding that was triggered last week on the
11 30th when we sent you the letter in the first instance and you
12 were then required to make your determination, which you did on
13 April 2nd.

14 In addition, there would be a request for a stay. The stay
15 is automatically put in place upon the submission of a protest.
16 I will argue that whether you get more than one protest -- the
17 fact that the protest date is based on the time that we should
18 have or could have known; it seems clear to me that it
19 contemplates there could be something that happens down the
20 road.

21 For instance, you could sign a contract that when we see it
22 finally in the light of the public, that could have a cardinal
23 change. Cardinal change in the provision that is not
24 consistent with the proposal, that would give the bidder a
25 right to protest so there could be serial protests. What I'm

1 trying to do is avoid serial protests and just have this one at
2 least for now.

3 Ultimately, I'm not telling you that we are not going to
4 the courthouse at some point. But the next step would not be
5 there; it would be back to you again and since we are all here
6 I'm just saying can't we wrap it all up.

7 COMMISSIONER WALTERS: See, I have this problem
8 I do not see how under law when you are given a specific time
9 frame to do things; I don't see how you can just ignore that
10 because I don't see how -- well, for example, if this did not
11 come in in those 10 days, what if at the end of this there is
12 something else or something else. I agree that I don't believe
13 that you are interested in doing that, but I'm talking about
14 from a point of law it seems to me that a ten day window is on
15 that has to mean something.

16 The other problem I have is, I don't see how I can assert
17 the authority of the Commissioner of General Services. So
18 while I feel perfectly comfortable in listening to the
19 information that you have because I don't believe in any
20 situation you can ever have too much information, assuming it
21 is accurate. I do believe that I have to in my own thought
22 process separate that from the issues that were made in a
23 timely manner; that is my dilemma.

24 MR. NEY: You have prejudged the timeliness and
25 I respectfully disagree with that determination, but you

1 ultimately are one of the people that are going to make that
2 determination. The way the law is written, it provides for
3 protests that can happen all of the time. After the contract
4 is signed, then it is a different procedure, though, with the
5 Claims Commission after this situation. Because the contract
6 was signed, then we would seek damages to the Claims
7 Commission. It contemplates different things happening at
8 different times.

9 We just want to get it resolved through this process as
10 expeditiously as possible and then be able to make a
11 determination as to whether or not my client wants to or needs
12 to take any further action whether it is legal or
13 administrative.

14 We think respectfully that for the same reasons you can't
15 see why we might ask for this protest at this time; we can't
16 see how the State could possibly contemplate signing a contract
17 before -- well, when I think in the case of the statutes,
18 putting aside the Commissioner of General Service's authority,
19 it clearly violates the law. Even if it is up to the
20 Commissioner of General Services, how are we going to sign a
21 contract when a determination hasn't been made. I think that
22 is not the actual appropriate analysis. We can't see how the
23 State or anybody wouldn't follow the State law. So we are just
24 asking that it be done today so we don't have to do another one
25 of these meetings.

1 DEPUTY COMMISSIONER JONES: Mr. Ney, I'm sure
2 that you have arguments as far as the merit of the timeliness
3 separate from the merits of the issue of the surplus; am I
4 correct?

5 MR. NEY: Right.

6 DEPUTY COMMISSIONER JONES: I move that this
7 committee hear not the issues of the surplus issue but just
8 based on the merit of the timeliness and deal with this issue
9 now and get it over with.

10 MR. LEE: I second that.

11 COMMISSIONER HAWKINS: All in favor say Aye.
12 (Whereupon, all of the members of the review
13 committee said, Aye.)

14 COMMISSIONER HAWKINS: Okay. I have been
15 signaled by our General Counsel there for a short break. It is
16 by my clock 8:25; lets reconvene if at all possible by 8:35.
17 We are one hour in this and we really haven't started hearing
18 the issue yet. Let's adjourn for ten minutes.

19 (Whereupon, a short recess was taken at 8:26
20 a.m.)

21 (Whereupon, the following proceedings resumed at
22 8:36 a.m.)

23 COMMISSIONER HAWKINS: Okay, let's reconvene,
24 Mr. Ney.

25 MR. NEY: Yes, sir. Do you just want me to

1 generally go through it and then I can address the disposition
2 of property at the end and talk about the timeliness of that;
3 is that fine?

4 COMMISSIONER HAWKINS: That's fine.

5 MR. NEY: Today we are going to address five
6 issues or five and a half issues. The status of the limited
7 liability company, which ENA purports to be. We are going to
8 revisit briefly, but only briefly, the issue about the sealed
9 cost proposal.

10 The test failure of ENA is that it tests the dual ISDN
11 configuration. The problems that we discussed during Friday's
12 committee meeting related to the ineligibility of the cost
13 proposal submitted by ENA for E-rate Funding, not totally but
14 very significantly. Financial inability of ENA to perform the
15 offered services and then the issues related to the disposition
16 of property.

17 First on the LLC status, we laid that out in our letter of
18 protest as thoroughly as we can at this point. This is not a
19 proceeding that gives us access to depositions and sworn
20 testimony. We can't take discovery and know what all of the
21 documents that ENA has or may have or should have related to
22 the formation of the LLC; that is the State's responsibility.

23 ENA in its response to the protest letter offered to make
24 that available. It is our request because we haven't seen
25 that, that if it is available, that we be allowed to see it.

1 Based on what was told to me by Patricia Ganier, who was
2 identified as a manager of this member-managed LSC when it was
3 first created, there are problems. Either Patricia Ganier was
4 never a member, in which case you couldn't have an LSC because
5 it requires two people to start it. We just want to see that
6 there are two people. Otherwise the State is being cheated and
7 there is somebody taking advantage of the provisions of the LSC
8 limiting their liability without actually complying with the
9 law.

10 Or Patricia Ganier is a member, was a principal, and has
11 not been requested to participate in some of the requirements
12 under the law, including written consent to such small things
13 as changing the name of the company from Technology Partner to
14 Education Networks of America. That goes to the issue of
15 Ms. Ganier, who told me she never signed anything but one time
16 in 1996 related to this company and she wasn't even sure if
17 that was related to this company, clearly did not sign anything
18 and give written consent to the change of the name as
19 represented by Mr. Ganier as filing with the State. That
20 raises flags; that is a serious problem when you start treating
21 LSC's as though they are your own companies and do whatever you
22 want irrespective of the laws that apply.

23 So the State has a responsibility to do their due
24 diligence. We felt it was our responsibility to raise these
25 issues because you have to have a legal entity to have a

1 contract with, to look, to be responsible under the contract
2 and there is a problem there.

3 We, as private citizens of companies, don't have the
4 authority under the State law to go pursuing that in a court of
5 law, that is other people's responsibilities. But in this
6 instance, we think that it presents a legitimate ground to be
7 looked into, but because of the limited nature of the
8 proceedings, we couldn't show you as though we were in a court
9 of law. We just ask that that be looked at appropriately.

10 MR. LEE: Does this body have the authority to
11 determine that that is not a legitimate business?

12 MR. NEY: This body doesn't have the authority
13 of law to do that, but this body has the authority to make some
14 determinations about what is appropriate for the State to do
15 with respect to entering into a contract. When there are
16 serious questions about it, that a company deviates from the
17 requirements of an RFP or that misrepresentations are made
18 either in the RFP response or in documents provided in response
19 to the RFP, I think you do have the authority to look at that
20 and say, these representations give us sufficient cause to find
21 that we can't award a contract to this party.

22 They made a representation to the State and the Secretary
23 of State's Office that they had written consent of the members
24 to do something, of all members. They clearly did not; they
25 clearly did not or they didn't have two members to begin with.

1 That is the problem. No, you don't have the judicial authority
2 to make a binding determination ultimately, but I think you
3 have the responsibility to look at these and determine whether
4 it is responsible to proceed when there are questions of this
5 magnitude.

6 DEPUTY COMMISSIONER JONES: Mr. Ney.

7 MR. NEY: Yes, sir.

8 DEPUTY COMMISSIONER JONES: You interviewed
9 Ms. Ganier?

10 MR. NEY: I talked with Ms. Ganier, yes.

11 DEPUTY COMMISSIONER JONES: Did she deny that
12 her signature is on the original formation as a member?

13 MR. NEY: No, because I don't think there is any
14 -- I don't know what document there is. Ms. Ganier said this,
15 there is one document that she signed that she believes was
16 related to this and it was back in 1996; she never again would
17 sign any documents related to this.

18 To be clear, I thought the Ms. Ganier listed was Mr.
19 Ganier's ex-wife and I called her first and she said that is
20 not me, it is my daughter. Her daughter is in college now.
21 The law of Tennessee, and I think this is pointed out in the
22 response, doesn't require some documentation that you think ma
23 be there. They could have an organizational document governin
24 agreement, but it is not required for this type of LSC. I
25 don't know what she signed or whether it was even related to

1 this LSC.

2 As I said, we can't know and we haven't had that
3 opportunity, but from speaking with her and looking at the
4 documents and the filings with the State over the past couple
5 of years, there are questions there and we bring them to your
6 attention. We have to put them in the nature of a protest
7 otherwise it doesn't even get looked at.

8 MR. LEE: Just curiosity, so you contacted them
9 to see?

10 MR. NEY: Yeah.

11 MR. LEE: Just on a hunch?

12 MR. NEY: No, no, I read the managing member
13 filing and it said Patricia Ganier. Like I said, I thought
14 that was a woman who is a lawyer that used to practice in
15 Nashville. I called up to ask -- I haven't seen you in this
16 process, are you still a member? She told me it was her
17 daughter and she explained some things to me and I talked to
18 her daughter. That was it; we simply talked about whether she
19 had any role as a member or manager and that was the only basis
20 for talking to her and that is all we did.

21 As I said, there were limits as to where we could go
22 reasonably or at all under the process. So we think a red flag
23 was raised and we put it in here. The State needs to do its
24 due diligence and that is all we can do on this point.

25 COMMISSIONER HAWKINS: Would it be fair to

1 assume that what was required by the Secretary of State in the
2 filing and what is required in the RFP that those issues would
3 have been met?

4 MR. NEY: No, sir.

5 COMMISSIONER HAWKINS: Okay.

6 MR. NEY: The certificate of authority that they
7 have responded to and, I think, Commissioner Walters has put in
8 her denial of the bid protest documentation shows -- well, the
9 law says that that certificate is conclusive as to its
10 existence.

11 That being the case then the question is, what if these
12 misrepresentations about written consent of all members as
13 represented by Ms. Patricia Ganier, the younger, was a member
14 and she is saying I never signed anything about that; what is
15 to be made about that? That is the issue. Again, we can't go
16 much deeper into it and all of the answers I have to any
17 factual issue, I have already put in the letter.

18 The next issue I would like to revisit briefly, and I do
19 this delicately, is whether the cost proposal money was
20 submitted in a sealed envelope, a separately sealed envelope.
21 In the documents that you have that were provided by
22 Ms. Metcalf when she compiled all 12 inches of those documents
23 and continued to supplement them on an hourly basis. Packet
24 No. 5 is the cost proposal It contained a cost proposal or a
25 copy of the cost proposal of ENA.

1 I had a document, when we made copies of the State
2 documents that were provided to us immediately upon the
3 issuance of the notice of intent to award letter. We went
4 through all of the documents and we got a document which was a
5 copy of the ENA cost proposal and attached to the E-mail letter
6 that Ms. Shrago had explained, in the attachment with the
7 Commissioner's letter of finding denying the protest, that the
8 E-mail was received and the narrative was received, but the
9 cost information appended was not received by E-mail; it was
10 only received in a separate envelope.

11 The reason I raise it again is, this is a document that was
12 provided to us in this packet of materials that Ms. Metcalf
13 distributed. We never saw this document before that packet was
14 distributed; it wasn't in the boxes that we looked at, to our
15 knowledge.

16 More interestingly, this has a really bazaar copy that
17 shows that all four pages of that document copied dark, while
18 the cover copied light. Yet, we pulled out the files the same
19 four pages, something that copied normal, so we were just
20 wondering why there were two different copies and why is this
21 the only document that has such a bazaar copying pattern from
22 the State's files. It is not as though we could run through
23 100 documents and see that there was a bad toner or something.
24 That is why we raised it again.

25 Ms. Shrago, I believe, and the Commissioner said it was

1 sealed. We think the file still reflects that it might not
2 have been; there might have been a mistake. Unfortunately,
3 mistakes have to be held against the parties when they violate
4 the cost proposal procedure. It may be tragic but a mistake
5 can be fatal under the circumstances.

6 DEPUTY COMMISSIONER JONES: Is that the entire
7 cost proposal or is that a clarification?

8 MR. NEY: This was the E-rate Form 471
9 Clarification in response to Question 8 as the clarifications
10 proposed to ENA. There is clearly dollar signs here and it is
11 the dollar signs that aren't allowed to be made available
12 except through this sealed packet. Again, that is all I know
13 about that issue, but I want to put it before this committee.

14 The next issue that we have concerns about is the test
15 failure or the failure of ENA to conduct the tests. This issue
16 we addressed somewhat Friday. I don't have much more to add.
17 I will just direct everyone's attention, again, to this
18 document which I referred to on Friday, which is our
19 modification, ISIS's modification, of the document submitted by
20 ENA to the State in the demonstration testing segment of the
21 technical review.

22 MR. LEE: Do you recall what tab that is at?

23 MR. NEY: Well, in my document it was the very
24 last thing before the FCC filing.

25 MR. LEE: Thank you.

1 MR. NEY: I'm sorry that I didn't have this
2 tabbed.

3 MR. LEE: Was there a similar form for ISIS?

4 MR. NEY: I don't know that we did a similar
5 form. I don't think this was a required form; I don't know,
6 sir.

7 MS. SADIE ROSSON: Where is that again?

8 MR. NEY: Start from the back, but past the FCC
9 pleading. Again, I would just like to have the brief
10 opportunity to refer you to why we think that despite ENA's
11 position there is a clear failure of ENA to test its proposed
12 solutions.

13 The RFP requires that the equipment is to be tested; it is
14 to be configured to fully connect. There is two issues here,
15 there is equipment and configurations of equipment. I think
16 you heard on Friday that ENA, and Ms. Shrago said and maybe
17 perhaps Commissioner Walters concurred, that they tested a
18 single ISDN line successfully, that was, in fact, one of the
19 two tests that were tested at the Jere Baxter School by ENA.

20 The ISDN, it was intimated that it was two of those lines.
21 I don't think anyone actually said it because if they did that
22 would be totally inaccurate and technical people from ENA would
23 know that. A dual ISDN may use the same equipment; it may use
24 the same router, but it is a totally different configuration.
25 That is why it is presented differently and that is why it is

1 identified as a different type of circuit. Although I don't
2 know that is exactly the language I need to use, but it is
3 configured differently.

4 The RFP 5.2.4.2.3 required that is the configuration. The
5 dual ISDN configuration was not tested at either the Jere
6 Baxter School or the tower. What this chart shows most
7 significantly that there are 471 school in the State of
8 Tennessee proposed to be served by ENA under this contract,
9 that were not -- it had solutions or proposed solutions but
10 they never proved they could do. It is not enough to say
11 everyone does that; we are doing some now.

12 Well, ENA is not who is doing that now. In fact who is
13 running ConnectTEN now is my client, ISIS; they are the network
14 managers from the help desk. So that is not sufficient to say
15 well that is not hard to do; they are supposed to do it and
16 they failed to do it. If it was so simple why couldn't they do
17 it when they had the time to do it. 30 percent of the schools
18 it failed to show they could meet the testing for the
19 interoperability ConnectTEN requirements of the RFP.

20 The significance of that is not simply that, well, they
21 should lose two points under the testing procedure. It is
22 this, when you put something out for bid in a state, you put
23 out bids for services asking that they give you the full range
24 of everything that they need. You expect the State, in the
25 technical qualifications and reviews, to ensure that they are

1 going to get what they asked for.

2 If they take less than that and don't ensure that they are
3 getting the full scope of services, what the State has done is
4 alter the purpose of an RFP and the whole bidding process.

5 It is not sufficient that you find somebody that you think
6 can do it and later on will find out exactly how it is going to
7 be done. The bidding process is supposed to help the State
8 find who can do it.

9 When you have a 30 percent, a possibility that 30 percent
10 of the solutions, don't work or that this particular provider
11 can't do what they proposed, that is an enormous amount of the
12 contract that has failed; that is an enormous amount of the
13 bidding process that the State is losing out on. They are just
14 not knowing what they are getting. That is a substantial
15 deviation from the whole concept of asking somebody to bid and
16 give you a proposal and show you that they can do something
17 before you pay them \$75 million.

18 MR. LEE: Let me ask you on this issue --

19 MR. NEY: Yes, sir.

20 MR. LEE: -- your client did do the test on the
21 60?

22 MR. NEY: They did. The response showed that
23 the 60 test came in at about three minutes and 47 seconds
24 maximum time to benchmark of about three minutes and 30
25 seconds. Now we don't know; we have never seen the actual

1 testing scores. I saw one that was of the testing sheets that
2 -- that is not true, I think Mr. Hustad has looked at the
3 testing sheets but I haven't looked at them except for the one
4 that I saw when I was at the test site. I don't know how they
5 could determine that.

6 But I think the most important thing here, Mr. Lee, is
7 this. The point of today is not to determine whether ENA gets
8 it or ISIS gets this contract. The point is simply to
9 determine whether the State can give it to ENA. This is not --
10 I'm trying to avoid comparative approaches. I know that
11 intuitively you want to think, well, we have to find somebody
12 to give it to; we are under a lot of pressure. Well, that is
13 not the way this needs to be looked at.

14 It has to be looked at from first, does ENA get it; can
15 they have it; can their contract be signed. If they can't, you
16 can look to us. We think we are responsive; we think we can do
17 it, but I'm not making that argument today because the first
18 thing is first, can ENA get it.

19 It could be very well that it could be demonstrated that
20 ISIS shouldn't have it; I would be surprised, but lots of
21 things surprise me. That is not the point and that is not what
22 we are trying to do.

23 MR. LEE: Let me ask you this. The State has
24 stated that they waived that because of time constraints. Do
25 they have the authority in your opinion?

1 MR. NEY: They clearly do not under law or under
2 the RFP itself. The RFP provides that that would -- that would
3 constitute a change in the RFP.

4 COMMISSIONER HAWKINS: Let me follow up his
5 question with a question. Relating to the test itself, and
6 some constraints that were inadvertent and apparently caused by
7 the State and not either of the bidders, were in both
8 situations where the evaluators present who at least -- well,
9 the ones that I know about or have read about have a million
10 years of experience, were they available at these and did they
11 have any effect or impact on the outcome considering that of
12 the total points possible; two points of this testing was given
13 on this the same number to both parties?

14 MR. NEY: Mr. Chairman, I'm not totally sure
15 that I understand your question. The evaluators were there, at
16 least. I know three of the four members of the evaluation
17 team. I don't know if Mr. Waldie was; he might have been
18 there; I wouldn't recognize him if I tripped over him.

19 It is unfortunate perhaps that the problems caused at the
20 Jere Baxter School were problems that had to do with the
21 testing and demonstration, but nevertheless it doesn't mean
22 that that cannot foul up the RFP process.

23 The RFP provides in 3.2.0 that the State may unilaterally
24 amend it, but it must be in writing. That was not done to the
25 extent that this test requirement was amended. Let me make

1 another point. We are not just talking about the dual ISDN
2 lines at Jere Baxter. We are not just talking about this grid
3 with respect to the Jere Baxter tests.

4 ENA didn't test dual ISDN lines at tower test either. They
5 didn't test them at all; that is 30 percent of the schools with
6 a solution that hasn't been tested. So it is not a question.
7 Mr. Chairman, we suggest that is just the two points about
8 testing. The question is about whether you have a bid that is
9 responsive and sufficient to ensure and give the State the
10 level of certainty or some level of certainty that you are
11 about to enter a \$75 million contract is somebody who can do
12 something that they propose.

13 Again, we don't have all of these affidavits about, well,
14 they were there for three days and tried it and they were there
15 until 3:00 o'clock in the morning before. I can throw all of
16 that out and I kind of just did but they didn't test it; it
17 didn't work. Why not? It wasn't just a question about whether
18 there was a foul up in the testing procedure. That is really
19 our position with regard to the failure.

20 COMMISSIONER HAWKINS: I'm sure we will have
21 some more response on that issue.

22 MR. NEY: I'm sure there will be. The next
23 issue we have concerns, as we have stated particularly on
24 Friday, concerning the problems with the cost proposal, the
25 entire proposal, that ENA made as it relates to how they say